Privy Council appeal No. 29 of 1957

Khatijabai Jiwa Hasham - - - - - - - - - *Appellant*

v.

Zenab d/o Chandu Nansi - - - - - - - - *Respondent*

FROM

THE COURT OF APPEAL FOR EASTERN AFRICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH JANUARY, 1960

Present at the Hearing:

LORD TUCKER
LORD DENNING
MR. L. M. D. DE SILVA

[*Delivered by* LORD TUCKER]

This is an appeal from a judgment of the Court of Appeal for Eastern Africa of 15th March, 1957, affirming the judgment of the Supreme Court of Kenya dated 13th January, 1956, whereby specific performance by the appellant of a contract in writing dated 19th February, 1954, between the appellant and Haji Gulamhussein Harji for the sale by the appellant of a plot of land in Nairobi was decreed at the suit of the said Harji.

The respondent is the widow and executrix of Harji, since deceased. The parties to the proceedings in the Courts in East Africa will be referred to as plaintiff and defendant.

The contract sued upon was for the sale by the defendant of a plot No. 209/58/1 measuring 2·04 acres or thereabouts, together with all the buildings situate on Sclatters Road, Nairobi, in complete vacant possession for the sum of Shs. 100,000 payable as to Shs. 15,000 on the execution of the contract and the balance on presentation of documents of title to be executed by both parties within six months from the date of the agreement. This contract was signed by the defendant on 19th February, 1954, but was repudiated by her within a few minutes of signature on the ground that she had never agreed to sell the whole two acre plot but only an area of half an acre.

On 2nd July, 1954, between six and seven weeks before the last day for completion, viz., 19th August, the plaintiff issued his plaint.

It was contended on behalf of the defendant that the plaint was issued prematurely on the ground that the plaintiff having elected to affirm the contract (instead of treating the anticipatory breach as putting an end to it so far as the future obligations of either party are concerned), kept it in being for all purposes, and the anticipatory breach by the defendant (which would, if accepted as a breach, have afforded a cause of action for damages) will not avail the plaintiff to support a claim for specific performance. He must wait until there has been a failure to perform the contract within the period fixed thereby, notwithstanding that the defendant has previously intimated her refusal to do so.

No authority for this proposition was cited, but it is true to say that there is no express decision in any English case to the contrary. Their Lordships are of opinion that the fallacy of the submission consists in equating the right to sue for specific performance with a cause of

action at law. In equity all that is required is to show circumstances which will justify the intervention by a Court of Equity. The purchaser has an equitable interest in the land and could get an injunction to prevent the vendor disposing of the property. The order for specific performance often falls into two parts. The first can be of a declaratory nature and the second contain consequential directions. The first of the forms in Volume 3 of the Seventh Edition of Seton's Judgments and Orders at page 2136 is clearly suitable to a case where the time for performance may not have arrived even at the date of the order, but in such a case in the event of subsequent non-performance the Court would not require the issue of a fresh writ before making the consequential directions for performance. The Court will not, of course, compel a party to perform his contract before the contract date arrives, and would give relief from any order in the event of an intervening circumstance frustrating the contract. Their Lordships cannot accept as conclusive the sentence relied upon by Counsel for the defendant at page 866 in the dissenting speech of Lord Sumner in *Leeds Industrial Co-operative Society Ltd.* v. *Slack* [1924] A.C.851 which was a case dealing with recovery of damages in lieu of an injunction, and which did not call for decision of the question now under discussion. On the other hand the view expressed above accords with the decisions in the Canadian cases of *Roberto* v. *Bumb* [1943] 2 D.L.R. 613, and *Roy* v. *Kloepfer Wholesale Hardware and Automotive Co. Ltd.*, [1951] 3 D.L.R. 122, affirmed in [1952] 1 D.L.R. 158 and by the Supreme Court in [1952] 2 S.C.R. 465, and with the views expressed in the American Re-Statement of the Law of Contract Vol. 2 Sec. 360 as well as in Williston on Contracts Vol. 5 p. 3708-9. And in Vol. 2 of the 4th Edition of Williams on Vendor and Purchaser the following passage occurs at page 1001:—

" It has been mentioned that, as a rule, either party to a contract to " sell land is entitled to sue in equity for specific performance of the " agreement. This right is, in general, founded on a breach of the contract, " but not in the same manner as the right to sue at law. The Court has " no jurisdiction to award damages at law except in case of a breach " of the contract ; while the equitable jurisdiction to order an agreement " to be specifically performed is not limited to the cases in which at law " damages could be recoverable ". Support for this view is also to be found in the reasoning of Vaisey J. in *Marks* v. *Lilley* [1959] 1 W.L.R. 749 at 752 although the actual decision was concerned with a question of costs. Their Lordships accordingly agree with the decision of the Supreme Court of Kenya and the Court of Appeal for Eastern Africa in rejecting this contention and holding that there is nothing in the Indian Contract Act to compel acceptance of the contrary view.

The next submission on behalf of the defendant was that in any event there was no concluded contract between the parties because the contractual document relied upon was never signed by the plaintiff or executed by him before the defendant repudiated it. This point was never pleaded, is inconsistent with the action of counsel for the defendant in accepting the burden of proof at the trial and making the opening speech, does not appear to have been argued in the Courts below, is not dealt with in any of the judgments and does not appear in the appellant's Case or Reasons. In these circumstances their Lordships cannot entertain it nor can they give effect to it as relevant to the exercise of discretion in ordering specific performance since there may have been circumstances, which have never been investigated, from which it could be inferred that the signature of both parties to the document was not required.

Their Lordships will now turn to the defences relied upon at the trial the success or failure of which depend upon the ascertainment of the facts.

The principal defence was the alleged fraudulent misrepresentation by the plaintiff to the effect that an option to purchase given by the defendant to the plaintiff on 18th February, 1954 and the contract in writing dated 19th February, 1954 related to a half-acre plot (which she had previously told the plaintiff she was willing to sell) whereas in fact these documents

referred to a two-acre plot, and that the said documents written in English, which language she did not understand, were never translated or read over to her in Gujerati. Her case was that at a meeting with the plaintiff in a bazaar in Nairobi early in February, 1954, at which her son Sadru Din was present, she had told the plaintiff that she wished to sell land comprising half an acre with a building on it, being one portion out of four sub-divided plots next to the Mayfair Hotel for Shs. 100,000. Sadru Din gave evidence to the like effect. It was proved in evidence that Sadru Din was not in Nairobi at the date in question and the trial Judge found he had given false evidence and the defendant had suborned him to commit perjury. These findings are not now disputed. The plaintiff's version of this conversation, which was accepted by the trial Judge, was to the effect that the defendant had told him she had land over two acres with a building on it in Sclatters Road which she wished to sell and for which she wanted Shs. 100,000. He asked for an option at this price for one week, but she was only willing to give him one for three days. They agreed to meet next day at about 9 a.m. when she would give him the option. The meeting took place and the defendant signed the option which appears at page 377 of the Record. It is headed—

"Re my House on Slater Road adjoining Mayfair Hotel, Nairobi"

and proceeds

"In consideration of Shs. 5/- five I hereby give you option to "purchase the above property for Shs. 100,000 net one hundred "thousand. The above property is over 2 two acres and sub- "division is completed, ~~and Bicons is already been put~~. The "house of above property will be given in vacant possession with "all vacant land contain

"This option is good up to ~~20th~~ 22nd 1954 up to 1 p.m. to you or your "nominis."

The defendant's evidence was that this document was never read over or translated to her. She signed and her signature was witnessed by her cousin, a girl aged about 17, called Amina Hasham. Amina gave evidence to the same effect.

The plaintiff's case was that the option was read over to her by him and also by Amina who knew English. The next day 19th February, 1954 the agreement sued upon was signed at the office of a Mr. Ishani, an advocate of the Supreme Court, who had prepared the contract on the plaintiff's instructions. The defendant's case was that as a result of a telephone message from a Mr. Sultan she went to his shop where she found the plaintiff and from there, all three of them went to Mr. Ishani's office. Ishani asked her whether the plot belonged to her alone and whether the option was binding on her, to both of which questions she answered Yes. Thereupon Ishani wrote something on a piece of paper and sent it out to be typed. Two or three typed papers were brought back and Ishani told her to sign one, which she did. She said she wanted Shs. 25,000 down in cash, the plaintiff said he would pay Shs. 15,000 and then went up to Shs. 20,000, when Ishani intervened and said Shs. 81,000 is due to the Diamond Jubilee Trust on mortgage, to which she replied that she would make her own arrangements with the Diamond Jubilee Trust. At this point in the discussion Mr. Sultan remarked, "Oh, two acres are mentioned here", she said she was struck with horror and tore up the document she had signed. Her version was supported by Sultan who was called as a witness for her. Ishani was also called by the defendant to say he never read or explained the document to her. He and Sultan also corroborated her evidence as to the conversation immediately prior to her tearing up the document.

The plaintiff's evidence was to the effect that before the defendant signed the agreement Ishani, who is the defendant's nephew, had read and explained the document to her. He said that the defendant objected to the cash payment of Shs. 10,000 mentioned in the contract before she signed

it when Ishani reached that part of the agreement as he read it to her in Gujerati. Ultimately she agreed to Shs. 15,000 and a cheque for this amount was made out and handed to her. She then signed the agreement. After signing she enquired whether he had re-sold the plot to Hashambhai. On being told that Hashambhai was the sub-purchaser she flew into a rage and tore up the document. On the same day Mr. Akram an advocate wrote on her instructions a letter setting out her version as outlined above of the circumstances in which she had torn up the document and charging the plaintiff with fraud. Also on the same day a letter was written by Mr. Khanna the plaintiff's advocate which contained the following paragraph:—

> " After signing the agreement it appears you changed your mind, " putting forward the excuse that you were only selling the house and " part of the land and not the whole of the 2·04 acres, and tore up " the stamped and signed agreement and went away, declining to go " through with the completion of the transaction ".

This letter is, of course, strong corroboration of the defendant's version of the reason she gave for acting as she did. The plaintiff, however, in his evidence persisted in his version and in the course of his cross-examination gave evidence which was obviously false and from which he ultimately resiled only in reply to a leading question in re-examination when he was re-called more than two months after his previous denials. It is now common ground that his earlier answers on this subject were deliberate falsehoods.

Out of this conflict of evidence and with the plaintiff and defendant both having given what is now admitted to have been false evidence on parts of their cases the trial Judge had to be satisfied that the defendant, who had accepted the onus, had made out her case for rescission on the ground of the plaintiff's misrepresentation as to the contents of the documents which she had signed. The Judge having seen the witnesses in the box and having had the advantage, denied to an appellate tribunal, of forming an estimate as to their honesty and reliability said in dealing with the events of 19th February :—

> " I regret to say that I cannot trust any account of what then " took place except the account of the plaintiff ".

He did not give his reasons for rejecting the evidence of the defendant and her witnesses but he had found that she had suborned one of her witnesses to commit perjury and must have felt that he could put little reliance on her other witnesses.

The Court of Appeal for Eastern Africa considered that the trial Judge had not attached sufficient importance to the untruthful answers given by the plaintiff with regard to the reason given by the defendant for tearing up the agreement on 19th February. They accordingly proceeded to re-examine the whole of the evidence in detail and to form their own assessment thereon with the result that they arrived at the same conclusion as the trial Judge.

Their Lordships have been invited to go through the same process with a view to reaching the conclusion that although fraud had not been proved, none the less the Court should have given the defendant relief on the ground of mistake.

There are certain features in the case which have given their Lordships some anxiety. The most important of these are the following :—

1. In a case of this nature a Court will always give great weight to the contemporary documents, and the two letters, one from the defendant's advocate and the other from the plaintiff's, both show —as is now admitted—that the reason given by the defendant for tearing up the document was that which she had given in evidence. Whether or not it was the real reason or only her excuse, of course, remains to be decided.

(2) The very unusual fact of a party tearing up a document almost immediately after having signed it.

(3) The fact that the defendant would on the evidence admittedly have been out of pocket on the basis of the agreement of 19th February, 1954.

(4) That the document was written in a language which she could not read.

Their Lordships have accordingly reviewed the whole of the evidence in the light of the above considerations and having regard to the pleadings. In this connection reference must be made to paragraph 11 of the Defence. It reads as follows :—

" In the further alternative the agreement sued upon was entered " into by mistake in that the terms thereof have been drawn up so " as to contravene the intention of the parties by purporting to refer " to the whole of the plot 58/1 L.R. 209 as aforesaid, whereas it " should have referred to the said portion of land only."

This is a plea of mistake common to both parties which was not the case made by the defendant. Treating it, however, as a plea of unilateral mistake it could, in the absence of fraud, only afford ground for rescission if the mistake was induced by some innocent misrepresentation made by or on behalf of the plaintiff or by some misleading conduct on his part. In the present case the vital issue was whether the option and agreement were or were not read over and explained to the defendant. If she failed to satisfy the Court on this issue there could be no ground for mistake on her part attributable to any conduct on the plaintiff. On the other hand, if she succeeded it is difficult to see how the plaintiff could have escaped a finding of fraud. It is for this reason that their Lordships consider that the trial Judge was right in saying that the issue of mistake could carry no weight in view of the facts as he found them.

As stated above, their Lordships have carefully considered the whole of the evidence with the aid of the detailed examination and analysis thereof by counsel on each side and have arrived at the conclusion that the defendant has not made out a case for interfering with the findings of fact by the trial Judge and the Court of Appeal, and that on these findings her claim for rescission on the ground of mistake cannot succeed.

It was also contended for the defendant that on the facts a defence of *non est factum* had been established. This plea, which means that the document is a nullity, requires proof of a false statement as to the nature as distinct from the contents of the document. This distinction is often a question of degree, but in the present case such defence is not open to the defendant since no false statement by anyone, other than that relied upon in support of the allegation of fraud, was alleged or proved, and the alleged misrepresentation by the plaintiff has been rejected. It accordingly is not necessary to decide whether the difference between the two acres and half an acre in the circumstances of this case would have been a difference as to the nature or contents of the document.

It should be stated that other defences were raised in the pleadings to which it is necessary to make passing reference. One was that the defendant never dealt with the plaintiff as a principal but merely employed him as her agent to find a purchaser. This issue was decided against her and is not now relied upon. A defence of undue influence was abandoned at the trial and a further defence of rescission by mutual consent was not persisted in before the Court of Appeal.

It is necessary, however, to refer to the defence of undue influence which is contained in paragraph 10 of the defence, because the facts there set out were in substance relied upon before their Lordships in support of a submission by counsel for the defendant that the case was not one in which a Court should in the exercise of its discretion order specific performance. The particulars to paragraph 10 of the defence are as follows:—

" The plaintiff in his capacity as an agent for the defendant for the " sale of the said portion of land had gained active confidence of " the defendant ; the defendant is an aged woman unable to read

" or write in the English language, the land described in the option
" and agreement of sale is of a value greatly in excess of Shs. 100,000,
" the said consideration is unconscionable and the nature of her acts
" in signing the said option and agreement of sale was not explained
" to or understood by the defendant."

In view of the abandonment of this plea and the findings of the trial Judge and the Court of Appeal to the effect that the option and agreement were in fact read and translated to the defendant—a finding for disturbing which no sufficient grounds have been shown—their Lordships do not consider that a case has been made out for interfering with the discretion exercised by the trial Judge, and approved by the Court of Appeal, in ordering specific performance of the contract of 19th February, 1954.

For these reasons their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellant must pay the costs of the appeal.

(39013) Wt 8078—37 100 2/60 D.L

In the Privy Council

KHATIJABAI JIWA HASHAM

v.

ZENAB d/o CHANDU NANSI

DELIVERED BY LORD TUCKER

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